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**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

FILE: B-186395

DATE: February 25, 1977

MATTER OF: Libby Welding Company, Inc.

**DIGEST:**

1. Evaluation of bids based on adding cost of packaging to unit price for both first program year and multi-year quantities is proper where invitation provides that bids on initial program year quantities will be so evaluated and invitation amendment provides that clauses applicable to initial year items are also applicable to multi-year items.
2. Addition of transportation costs to unit prices is consistent with only reasonable interpretation of invitation and therefore is not improper.
3. Agency decision not to waive first article preproduction testing requirement on basis that equipment being furnished by bidder under prior contract has not satisfactorily passed initial production testing is not arbitrary or capricious and is consistent with agency regulations.
4. Allegation that award under solicitation would constitute breach of protester's existing contract with agency is untimely and will not be considered on merits since complaint relates to issuance of solicitation but was not filed prior to bid opening.

Libby Welding Company, Inc. (Libby) protests the proposed award of a contract to John R. Hollingsworth Company (Hollingsworth) under invitation for bids (IFB) DSA 400-76-B-3610, issued by the Defense Supply (now Logistics) Agency (DSA), Defense General Supply Center, Richmond, Virginia.

The procurement, for 15 KW and 30 KW generator sets, is being conducted by DSA pursuant to a Military Interdepartmental Purchase Request (MIPR) initiated by the U.S. Army Troop Support Command (TROSCOM). Bidders were authorized to submit bids on the basis of one program year or the multi-year requirement of three program years, or both, with DSA reserving the right to award a contract on either basis. DSA has determined that award on the multi-year basis would be most advantageous to the Government.

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Bids were opened on June 21, 1976. The two low bids were submitted by Libby and Hollingsworth. Libby's multi-year bid price was \$9,591,522.02 (plus \$2,000 for data); Hollingsworth's bid was \$9,713,940.00 (less a prompt payment discount). However, in evaluating the bids, the contracting officer included (in addition to items not contested) the cost of packing, packaging and preservation (hereafter "packaging") for the generator sets, as well as an amount for transportation of the sets. The contracting officer's evaluated bid price for Hollingsworth was lower than Libby's evaluated bid by approximately \$34,000.

There are two principal grounds for Libby's protest. First, Libby contends that with respect to both packaging and transportation, DSA improperly evaluated bids in violation of the solicitation provisions and applicable regulations. Second, Libby charges that the contracting officer has arbitrarily and capriciously refused to waive first article testing with respect to Libby. In addition, Libby contends that the award of a contract to any other bidder would constitute a breach of a contract currently existing between Libby and TROSCOM.

If Libby is correct with respect to either packaging or transportation, or if DSA were to waive first article testing requirements for Libby, Libby would be the evaluated low bidder.

#### EVALUATION

##### Packaging

With regard to packaging costs, the solicitation as originally issued provided that bidders were to furnish the estimated cost of packaging on a unit basis under the various levels of packaging specified in the solicitation. However, the solicitation stated that "These estimated costs will not be considered separately in the evaluation of the solicitation \* \* \*." This original solicitation provided only for Items 0001 through 0078. By Amendment No. 0001, DSA added Items 0079 through 0115 (with items 0083 through 0115 constituting the second and third program year requirements). The amendment also stated the following:

"CLAUSES APPLICABLE TO ITEMS 0001- 0082 ARE  
ALSO APPLICABLE TO ITEMS 0083 - 0015"

SECTION G - Preservation, Packaging, Packing and Marking shall be in accordance with Packaging Data Sheet No. 618. See Pages 55 and 56.

LEVEL A/A UNIT PRICE \_\_\_\_\_  
LEVEL B/B UNIT PRICE \_\_\_\_\_

The unit price for the appropriate level of Preservation, Packaging, Packing and Marking will be in addition to the unit price specified for the generator set.

SECTION C - Page 54: Para A is changed to read:

- A. PRESERVATION, PACKAGING AND PACKING shall be LAW Packaging Data Sheet No. 618 and as follows:  
Items 0001 - 0007, 0009, 0079 and 0081 - LEVEL B/B  
Items 0008, 0010 - 0029, 0041 - 0064, 0080 and 0082 - LEVEL A/A" (Emphasis added.)

Libby included unit prices in its bid for the two packaging levels, and the contracting officer utilized those prices in evaluating Libby's line item bid prices for all three program years. Libby, however, contends that the IFB provided that the unit price for packaging was to be considered only in the evaluation of first program year item prices and that bidders were required to include the cost of packaging in their line item prices for the second and third program year items. Libby asserts that in fact its bid prices for the generator sets in the second and third years are inclusive of packaging costs and that the contracting officer erred in adding an additional amount to those prices.

In support of its position, Libby relies on Clause 2(c) of Standard Form 33-A. That clause provides:

"(c) Unit price for each unit offered shall be shown and such prices shall include packing unless otherwise specified."

Standard Form 33-A, although not attached to the IFB, was incorporated by reference.

We think Libby's reliance is misplaced. Clause 2(c), by its own terms, applies only in the absence of any other provision for pricing of packaging.

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In this connection, we agree with the DSA/Hollingsworth reading of the IFB amendment that the packaging costs provision must be regarded as applicable to the second and third program years. Amendment No. 0001 states that "CLAUSES APPLICABLE TO ITEMS 0001-0082 /the first program year/ ARE ALSO APPLICABLE TO ITEMS 0083-0115 /the second and third program years/." Libby would not read that sentence to apply to packaging because it physically precedes the Section G (the packaging section) revisions, rather than being located within the Section G heading. Libby's view is that the sentence should be read as referring exclusively to the Section E revisions which appear on the previous page of the Amendment. However, Section E essentially consists of the schedule line items and various provisions identifying the procurement as a multi-year procurement. We see nothing in Section E to which the sentence in question would reasonably relate. To the contrary, it appears that the sentence was meant to apply and only could reasonably apply to the sections which followed it. Thus, we find no basis for objecting to the contracting officer's adding an amount for packaging to Libby's item unit prices.

Transportation

The IFB provided that "E/or computing unit transportation costs, each bid will be evaluated by adding to the bid \* \* \* all Government transportation costs to said destinations." In evaluating transportation costs, the contracting officer regarded the destination of the generators listed as Items 0061, 0063 and 0064 to be New Cumberland, Pennsylvania. Libby argues that no transportation costs at all should be evaluated for these items because no destination were designated in the IFB for such items.

The pertinent portion of the IFB schedule reads as follows:

"ITEM NO.	SUPPLIES/SERVICES
0061	MIPR W58P05-6-00809 ( <u>ITEMS 0061</u> <u>thru 0064</u> ) SHIP TO: Trans Ofc W25G1U New Cumberland Army Depot New Cumberland, PA 17070 M/F: USATROSCOM PROP ACCT W58HZ1-5198-C028  FOB DESTINATION

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OR  
FOB ORIGIN

0062                      FOB DESTINATION

OR  
FOB ORIGIN

0063                      FOB DESTINATION

OR  
FOB ORIGIN

0064                      FOB DESTINATION

OR  
FOB ORIGIN"

We think the only reasonable reading of the schedule and the quoted provision is that (1) a transportation cost will be added to the bid price for each item (bid on an FOB origin basis) and (2) that the specified MIPR covers Items 0061 through 0064 and that all are to be shipped to New Cumberland, Pennsylvania. This reading is internally consistent with other IFB item descriptions where supplies to be shipped to the same destination are repeated under consecutive line items. Accordingly, we find Libby's contention with regard to evaluation of transportation costs to be without merit.

FIRST ARTICLE TESTS

Libby alleges that the contracting officer has arbitrarily and capriciously refused to waive first article testing with respect to Libby in accordance with the following IFB provision.

"C46 WAIVER OF FIRST ARTICLE APPROVAL TEST  
(CONTRACTOR TESTING) (DECREASE IN PRICE)  
(SEPARATE LINE ITEM) (1975 DEC)

The Government reserves the right to waive the requirement herein for first article approval tests as to those offerors offering a product which has been previously furnished and has been accepted by the Government. Offerors offering such products, who wish to rely on such prior acceptance by the

Government, must furnish evidence with the offer that prior Government acceptance is presently appropriate for the products to be furnished hereunder by indicating below contract numbers of identical or similar supplies accepted by the Government. When the Government decides to exercise its right to waive first article approval testing, offers will be evaluated on the basis of decreased cost to the Government." (Emphasis added.)

In response to this provision, Libby listed under the heading of "Prior Government Acceptance" contract number DAAK02-72-C-0265, awarded to Libby by TROSCOM in 1972, and offered to reduce its bid in the amount of \$450,000 for waiver of first article approval tests.

After bid opening, the contracting officer determined not to waive first article approval test for any bidder on the basis of a recommendation by TROSCOM, the requiring agency. In DSA's view, "After studying the information presented by TROSCOM in support of its recommendations, any other determination by the contracting officer would be wholly unwarranted, totally without a reasonable basis, and clearly an improper and overreaching use of discretion."

Libby, on the other hand, argues that under its current contract, DAAK02-72-C-0265, it has offered an appropriate product "previously furnished and accepted by the Government" qualifying it for waiver, and that it would be an abuse of discretion for DSA not to grant the waiver. In this regard, Libby contends that since it was the only potential bidder eligible for waiver, it was improper for the IFB to contain a waiver of first article testing provision if DSA did not intend to grant the waiver to Libby.

TROSCOM refuses to recommend a waiver for Libby principally because of failures experienced in initial production testing of generators under Libby's current contract. In addition, TROSCOM asserts that there have been changes in the drawing package relating to the generators and that this procurement is a first time buy with military specifications which differ from the purchase description used in connection with Libby's current contract.

Libby's position is that the generators to be procured do not in any material way differ from those being delivered under Libby's current contract. Libby also argues that the equipment failures

that have been experienced are the result of defective Government specifications or otherwise are not its fault, and that in any event such failures were minor and/or have been corrected. Moreover, Libby alleges that since the failures were detected during initial production testing, they should have no bearing on the decision to waive first article testing. Finally, Libby asserts that the Government is "accepting" generators under its contract and that this is evidence of the suitability of the generators and satisfies the condition for granting waiver.

TROSCOM's position is that there is substantial doubt as to the adequacy and reliability of the Libby generators individually and under mass production. On December 17, 1976, TROSCOM reported the following:

"2. Problems identified in previous correspondence have not yet been finally resolved. The major problems observed during testing include failures of the starting relay (K3), the battery charging alternator, the over-speed switch and drive assembly and the timing gear train (camshaft gear). These problems resulted in suspension of tests. Tests were resumed and suspended again due to additional failures of the overspeed switch and drive assembly. Tests were resumed and completed during Dec. 1976 with test failures and required corrective action in several areas not yet resolved. Also, additional problems exist in the area of substandard wiring (short circuits and burned out connectors) along with remaining unresolved situations mentioned above. It is the opinion of this command that any failures causing major teardown procedures, component failures causing non-operational generator sets and resulting in various technical data changes are not to be considered minor.

"3. Production units are being accepted by the Government under Contract DAAK02-72-C-0265 with the understanding that retrofit of the generator sets will be required prior to issue to the field. The retrofit will depend upon test results and evaluation as to corrections required and responsibility for the installation of the retrofit. Production

stoppage pending proof testing of proposed resolutions was not considered advisable, the contract has been modified to incorporate the proposed corrective actions in anticipation of successful testing which may reduce the number of generator sets requiring retrofit. As mentioned above, these are included in the areas which remain to be resolved.

"4. This command retains its position not to waive testing for any bidder under subject solicitation which is the Government's prerogative since current testing has not proved successful in determining suitability of these generators for issue to users in the field."

The decision to waive or not waive first article testing for a particular bidder is essentially an administrative one which we will not disturb unless it is clearly arbitrary and capricious. See Ainslie Corporation, B-187429, B-187559, December 21, 1976, 76-2 CPD 513; Kan-Du Tool & Instrument Corporation, B-183730, February 23, 1976, 76-1 CPD 121; Consolidated Airborne Systems, Inc., B-184369, October 21, 1975, 75-2 CPD 247. Here, while Libby has submitted considerable evidence in an attempt to minimize the generator failures referred to by TROSCOM, we do not find that the record convincingly establishes that the contracting officer's refusal to waive first article testing for Libby is arbitrary.

First of all, it is not disputed that there have been failures associated with the equipment furnished by Libby under its prior contract, and that these failures resulted in "non-operational generator sets." It is also clear that at least some of the failure areas have not been finally resolved. Although Libby states that the failures are correctable without the need for first article testing under a new contract, the using agency believes that the problems are such that it is not willing to accept a new production run from Libby without first article testing approval. Under these circumstances, we cannot say that the TROSCOM/DSA position is so without a rational foundation that it can be denominated arbitrary or capricious. Libby's claim that the failures are the fault of the Government rather than of Libby suggests that there may be a dispute on the matter which would have to be resolved under the Disputes clause of the existing contract, but does not, in our opinion, provide a basis for concluding that TROSCOM/DSA is acting improperly in refusing to grant a waiver of first article testing prior to resolution of that dispute.



Secondly, we do not agree that equipment failures realized during initial production testing cannot be considered by agency officials in determining whether to waive first article testing. Libby makes much of the difference between initial production and first article preproduction testing, asserting that the first article preproduction testing requirement is to determine the ability of the contractor to furnish a product that is satisfactory for its intended use, thereby protecting the Government from having to make progress payments and from incurring an obligation to pay production costs in the event of contract termination prior to Government approval of the first article, while initial production testing is for determining the suitability of mass-produced equipment and is therefore conducted on equipment produced "well beyond" the time first article testing and approval takes place. However, we think the regulations suggest a closer relationship.

Part 19 of the Armed Services Procurement Regulation (ASPR) (1976 ed.), entitled "First Article Approval", defines "first article" as including both preproduction models and initial production samples. It defines "approval" as involving testing and evaluation of the first article "for conformance with specified contract requirements before or in the initial stage of production under a contract." ASPR § 19.201. The relationship between preproduction and initial production testing is further indicated by Army Regulation (AR) 700-78 (February 6, 1970), which describes both aspects of first article testing as "designed to insure that the contractor can furnish a product that is satisfactory for its intended use." It then goes on to define first article preproduction testing as:

" \* \* \* tests conducted on a model or group of models of the item being procured, built prior to mass production in accordance with contract specification and drawings, using substantially the same methods, materials, processes, and type of equipment as will be used for mass production. These tests are conducted or supervised by the procuring agency to verify production drawings, processes, and materials that will be used in the manufacture of the item."

And initial production testing as:

" \* \* \* a test of the first or one of the first produced items or group of items conducted to verify the adequacy and quality of the material when produced according to production drawings and the mass production process."

We think it is clear that while the preproduction and initial production tests are conducted at different times and on different equipment items, the tests are utilized for the same basic purpose--to show that the contractor can furnish a satisfactory product--and as such we fail to understand why difficulties encountered in initial production units cannot be considered by a contracting agency in deciding whether to waive first article preproduction testing for a subsequent contract. In this regard, AR 700-78 specifically provides that the "quality history of the product based on previous production" may be considered in determining the extent to which "quality assurance testing during production" (which is specifically defined as encompassing first article testing) should be required.

Third, we cannot agree that the inclusion of the waiver of first article approval clause in the IFB gave Libby the absolute right to have the waiver granted or that inclusion of the provision otherwise was improper. The clause does no more than reserve to the Government the right to waive first article testing for any bidder found to be qualified for such a waiver. While prior acceptance by the Government of identical or similar supplies is a requirement for first article waiver, we do not believe that such acceptance automatically requires the Government to waive first article approval testing in all subsequent cases, since there may well be particular facts or circumstances which would warrant a determination not to waive first article testing, and the clause itself requires a showing that prior acceptance is "presently appropriate" as a basis for waiver.

With regard to the propriety of including the first article waiver clause in the IFB, ASPR § 1-1903(b) does preclude the use of the clause "when it is known that first article approval will be required of all bidders \* \* \*." However, we do not believe it can be said that it was known, at the time the IFB was issued, that Libby would not have satisfactorily completed initial production testing and would not be considered qualified for first article waiver. Therefore, we see no basis for concluding that issuance of the IFB with the first article waiver provision was inappropriate.

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For the above reasons, we find that the contracting officer's decision not to waive first article preproduction testing from Libby was not "arbitrary, capricious or without substantial basis in fact." Consolidated Airborne Systems, Inc., supra.

BREACH OF CONTRACT

Libby's contention that award of a contract under the solicitation would constitute a breach of its existing contract is untimely and will not be considered on its merits. Libby's complaint obviously relates to the issuance of the IFB, which clearly contemplated award of a contract and was not, as suggested by Libby, merely to "test the market." This protest, however, was not filed until after bid opening, and is clearly untimely under our Bid Protest Procedures. 4 C.F.R. § 20.2(b) (1976).

The protest is denied.

  
Acting Comptroller General  
of the United States